79-142

Supreme Court, U. S.
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In the Supreme Court of the United States

No. .....

SUSAN GARFINKLE, et vir.,

Respondents,

vs.

SUPERIOR COURT OF CONTRA COSTA COUNTY
(WELLS FARGO BANK, ET AL.,
Real Parties in Interest),

Petitioners.

Petition for Writ of Certiorari to the Supreme Court of the State of California

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In the Supreme Court of the United States

No. .....

SUSAN GARFINKLE, et vir.,

Respondents,

vs.

SUPERIOR COURT OF CONTRA COSTA COUNTY
(WELLS FARGO BANK, ET AL.,
Real Parties in Interest),

Petitioners.

Petition for Writ of Certiorari to the Supreme Court of the State of California

Petitioner prays that a Writ of Certiorari issue to review the order of the California Court of Appeal in the case of Susan Garfinkle and Gary Garfinkle, Petitioners, vs. Superior Court, Contra Costa County, Respondent, Wells Fargo Bank, et al., Real Parties in Interest; Number 1 Civil 45643 in that Court.

OPINIONS BELOW

The decision of the California Court of Appeal on Petition for Extraordinary Relief in the Nature of Mandamus directing the Superior Court to vacate its summary judgment and to enjoin assertion of due-on-sale rights, is attached as Appendix A.

JURISDICTION

The decision of an intermediate State Appellate Court is the decision of the highest Court of the State in which a decision

could be had, where the State's Highest Court has refused to review the decision. *Sullivan v. Texas,* 207 U.S. 416 (1908); *Hammerstein v. Superior Court,* 341 U.S. 491, 492 (1951); *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 160 (1954); *Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676, 678, n.1. (1968).

The decision of the California Court of Appeal is "law of the case"; *Tally v. Ganahl,* 151 Cal. 418 (1907); *Pigeon Point Ranch v. Perot,* 59 Cal.2d 227, 232 (1963); *People v. Shuey,* 13 Cal.3d 835 (1975); *Cooper v. County of Los Angeles,* 69 Cal.App.3d 529 (1977); and it is "final", for the mandate concludes this case on the federal question presented. *Pope v. Atlantic Coast Line R. Co.,* 345 U.S. 379, 382 (1953); *North Dakota Pharmacy Board v. Snyder's Stores,* 414 U.S. 156, 159-164 (1973); *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 479-485 (1975).

A copy of the order of the California Supreme Court dated May 3, 1979, denying timely Petition for hearing is attached as Appendix B. This Court has jurisdiction under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

A decision of the California Supreme Court which changed the substantive law of contracts and property has been applied to contracts which were valid under the law of contracts and property in effect when the contracts were made.

The questions presented are:

(1) Whether impairment of contract rights by State legislative action prohibited by Article I, Section 10 is also prohibited by the Fourteenth Amendment guarantee of substantive due process.

(2) If so, whether the Fourteenth Amendment permits the State courts to impair contracts in a way which the State legislature could not constitutionally do.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Title 28 U.S.C. § 1257:

> "Final judgments . . . by the highest court of a State in which a decision could be had, may be reviewed . . . as follows: . . . (3) By writ of certiorari . . . where any right . . . is . . . claimed under the Constitution . . . of . . . the United States."

United States Constitution, Article I, Section 10:

> "No state shall . . . pass any . . . law impairing the obligation of contracts."

United States Constitution, Fourteenth Amendment:

> ". . . nor shall any state deprive any person of . . . property, without due process of law . . ."

California Civil Code Section 711:

> § 711. *Conditions restraining alienation void.* Conditions restraining alienation, when repugnant to the interest created, are void."

STATEMENT OF THE CASE

Petitioner's contract right to accelerate a note has been taken away by action of the State of California, acting through its courts.

In 1967 Petitioner loaned money on a note and Trust Deed, each of which included a due-on-sale clause providing that Petitioner could accelerate the maturity of the note if the borrower sold the house covered by the Trust Deed.

In 1967 it was settled law in California that due-on-sale clauses were valid and were not unreasonable restraints on alienation.

The California Supreme Court had held in 1964:

> "In the present case it was not unreasonable for plaintiff to condition its continued extension of credit to the Enrights on their retaining their interest in the property that stood as security for the debt. Accordingly, plaintiff validly provided that it might accelerate the due date if the Enrights encumbered or transferred the property." *Coast Bank v. Minderhout,* 61 Cal.2d 311, 317 (1964)

This decision was followed in *Jones v. Sacramento Sav. & Loan Assn.*, 248 Cal.App.2d 522 (1967); *Hellbaum v. Lytton Sav. & Loan Assn.*, 274 Cal.App.2d 456 (1969), and *Cherry v. Home Sav. & Loan Assn.*, 276 Cal.App.2d 574 (1969), Hearing Denied (1969).

In 1970 Mr. Garfinkle, a lawyer, and his wife, bought the property covered by Petitioner's Deed of Trust.

They bought knowing that the property was subject to a Trust Deed which contained a due-on-sale clause and that petitioners might refuse to permit assumption of the loan by them, if they would not agree to pay interest at the currently prevailing rate, which they could afford, but were not willing to do.

They contracted to assume, and if they could not assume, to pay off the loan.

As they foresaw, petitioner, because they would not agree to the currently prevailing interest rate, refused to agree to assumption, and in 1970 accelerated the Note and commenced proceedings to foreclose by exercise of power of sale.

Litigation commenced,[1] and Petitioner forbore pending disposition of the litigation from completing the foreclosure proceedings which it had commenced.

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1. The early history of the litigation comprised a series of unproductive legal actions. The Garfinkles first sued for injunctive and declaratory relief in the United States District Court for the Northern District of California. On appeal from a judgment of dismissal for lack of jurisdiction, the Ninth Circuit reversed, finding a substantial federal question, and directed the District Court to abstain and the Garfinkles to file a state action to resolve the issues. *Garfinkle v. Wells Fargo Bank,* 483 F.2d 1074 (9th Cir. 1973). The Garfinkles then filed a petition for original writ of mandate in the California Court of Appeal, which was denied for lack of reason to circumvent the Trial Court. The California Supreme Court denied a hearing. The Garfinkles, in 1977, commenced the present action in the California Superior Court, as could have been done in 1970. In 1978, the Garfinkles' petition for original writ of mandate on the issue of the constitutionality under the 14th Amendment of Power of Sale foreclosure was filed, resulting in decisions upholding such foreclosure. *Garfinkle v. Superior Court,* 21 Cal.3d 268 (1978); Appeal dismissed for want of a substantial federal question, ... U.S. ....., 99 S.Ct. 343 (1978). Petitioner took no action believing that the law of 1967 applied to its contract.

In April 1977 Petitioner moved for summary judgment on the due-on-sale issue.

In May 1978 the Trial Court stayed further proceedings awaiting final decisions in pending cases on the status of due-on-sale clauses, which had become unsettled by decisions of the California Supreme Court.

After *Coast Bank, Jones, Cherry and Hellbaum, supra,* a series of California cases involving due-on-sale clause were decided.

In 1971, the California Supreme Court in *La Sala v. American Savings & Loan Assn.*, 5 Cal.3d 864, 879, 883 (1971), said:

> "Following *Coast Bank,* three published Court of Appeal decisions have held that due-on-sale clauses in trust deeds do not constitute unlawful restraints on alienation . . .
> Thus, although California cases have clearly held a due-on-sale clause valid, the language in such cases respecting due-on-encumbrance provisions is . . . entirely dictim.

The Court thus affirmed the validity of acceleration on sale and held that a due-on-encumbrance clause was an unreasonable restraint on alienation, saying:

> ". . . We have concluded that the lender may insist upon the automatic performance of the due-on-sale clause *because such a provision is necessary to the lender's security.*" (emphasis added)

It had not previously been hinted that a need to protect the lender's security was a condition precedent to "automatic" enforcement of a due-on-sale clause. The need as a condition precedent was expressly rejected in *Cherry v. Home Sav. & Loan Assn., supra.*

In 1974, the California Supreme Court in *Tucker v. Lassen Savings & Loan Assn.*, 12 Cal.3d 629 (1974) considered a due-on-sale clause in an installment land sale contract in which there was a small down payment and very little equity in the contract purchaser, and in which the seller retained title until completion of payment of the contract price. The Court said:

"In *La Sala* . . . we concluded that while a lender may insist on the automatic enforcement of such a [due-on] clause upon the occurrence of an outright sale . . ., he may not exercise such an absolute power upon the further *encumbering* of the property . . . *but may enforce such clause only when enforcement is reasonably necessary to protect his security.*" (emphasis added) Tucker v. Lassen, *supra.* at 632.

The Court held that enforcement of a due-on-sale clause in an installment land sale contract was an unreasonable restraint on alienation unless necessary to protect the lender's security.

Meanwhile, *Wellenkamp v. Bank of America* was proceeding through the California courts. It presented, again, the issue which had been decided in *Coast Bank,* and confirmed in *Jones, Cherry, Hellbaum,* and *La Sala,* namely: whether a lender could "automatically" accelerate under a due-on-sale clause where there was an outright sale.

The opinion in *Wellenkamp v. Bank of America,* 21 Cal.3d 943 (1978) is attached as Appendix C.

The decision overruled *Coast Bank,* disapproved *Jones, Cherry, Hellbaum* and held that a lender could enforce a due-on-sale clause in the event of an outright sale only where enforcement was necessary to protect the lender's security.

The effect of the decision was to alter the terms of the note and allow the borrower home-owner to sell his loan and interest rate and thereby facilitate the sale of his home *at his price,* rather than at the lower price which rising interests rates would have forced on him had he owned his home free and clear.

Addressing the question presented in this Petition, the California Supreme Court said:

"It is urged that our decision should be given a purely prospective effect, given the reliance on existing laws by lenders when they entered into long-term real estate loan contracts. 'It is the general rule that a decision of a Court of

Supreme Jurisdiction overruling a former decision is retrospective in its operation' . . . We see no reason to depart from this rule in this case merely because of the lenders' expectations that they would derive economic benefits from enforcement of the due-on-clause." Wellenkamp v. Bank of America, *supra* at 955-956.

In these words the California Supreme Court (1) recognized that long-term real estate loan contracts had been made by lenders in reliance upon existing substantive contract and property law and in the expectation of economic gain to be derived from the due-on-sale clause used in accordance with existing substantive contract and property law, (2) overruled existing substantive contract and property law and (3) applied the new substantive law retroactively to deny the economic expectations on the basis of which the lenders made the contracts on faith in existing substantive law.

The Court then said:

"However, given the importance of the stability of real estate titles and the interest in preserving completed real estate financing arrangements, we hold that this decision shall not apply when the lender, prior to the date that this decision becomes final, has either enforced the due-on clause, resulting in sale of the subject property by foreclosure or in discharge of the accelerated debt, or when the lender has waived enforcement of the due-on clause in return for an agreement with the new buyer modifying the existing financing." Wellenkamp v. Bank of America, *supra* at 954.

Petitioner immediately took the steps necessary to permit the foreclosure proceedings, which it had commenced in 1970, to be completed on September 22, 1978, prior to September 29, 1978, the date on which the decision in *Wellenkamp* would become final.

Concurrently, on August 29, 1978, Petitioner moved for Summary Judgment.

On September 14, 1978, Respondents filed an Application for Order to Show Cause and Temporary Restraining Order restraining sale.

On September 14, 1978, the Trial Court granted a Temporary Restraining Order, setting the matter for hearing September 29, but imposing the condition:

> "That if a preliminary injunction is not issued, then the date of sale shall be considered the initially scheduled date of September 22, 1978."

On November 7, 1978, the Trial Court announced its ruling granting the Motion for Summary Judgment continuing the preliminary injunction in effect upon the original terms and conditions until final action by the United States Supreme Court in *Garfinkle v. Superior Court, supra.*

On November 14, 1978, the Trial Court entered Summary Judgment of Dismissal of this action, as of September 14, 1978, and ordered that any sale under the Trust Deed be deemed to have occurred on September 22, 1978, the date initially scheduled for sale.

The Garfinkles petitioned to the California Court of Appeal for Mandamus. On March 5, 1979, the California Court of Appeal rendered its decision to issue a Mandate to the Contra Costa Superior Court to set aside its Order granting Summary Judgment for Real Parties and to set aside those portions of its Restraining Order of September 14, 1978, amended October 13, 1978, and Preliminary Injunction of November 7, 1978, which condition issuance upon "deeming the date of sale to be September 22, 1978."

On May 3, 1979, the California Supreme Court deemed timely Petition for Hearing.

In this way, Petitioner's contract and property rights have been taken and impaired by changes in the law of contracts and

property made by the State of California, acting through its Courts.

REASONS FOR GRANTING THE WRIT

This Court has held that State court action is state action for Fourteenth Amendment purposes and that a state may not through its courts deny rights guaranteed by the Fourteenth Amendment.

Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673 (1930); *Shelley v. Kraemer,* 334 U.S. 1 (1948); *Barrows v. Jackson,* 346 U.S. 249 (1953).

This Court has repeatedly held that retroactive application of new case law to contracts made on the faith of earlier contrary case law, does not deny due process under the Fourteenth Amendment, although the same action if taken by the legislature would do so.

Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924); *Barrows v. Jackson, supra; Shelley v. Kraemer, supra; Stockholders v. Sterling,* 300 U.S. 175 (1937); *Hawks et al., v. Hamill, et al.,* 288 U.S. 52 (1933); *Gt. Northern Ry. v. Sunburst Co.,* 287 U.S. 358 (1932); *Fleming v. Fleming,* 264 U.S. 29 (1924); *Brinkerhoff-Faris Co. v. Hill, supra.*

To make new law applicable retroactively to destroy rights acquired on the faith of formerly well-settled law, is the essense of government by men, not law. It is a manner of government rejected by our society, as well as by our law, because it is unfair.

The dilemma presented in allowing the courts to make law retroactive where the legislature cannot do so, needs explanation.

It is explained by the same Court which decided *Tidal Oil Co. v. Flanagan, supra*:

> "The effect of the subsequent decisions is not to make a new law but only to hold that the law always meant what the Court now says it means." *Fleming v. Fleming, supra.* at 31, 32.

This explanation is myth, as has been recognized:

> "[A] change of judicial decision after a contract has been made on the faith of an earlier one the other way is a change of the law." Holmes, J. dissenting in *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 371 (1910).

The myth was abandoned by this Court 15 years ago. *Linkletter v. Walker,* 381 U.S. 618, 622-629 (1965). This Court no longer indulges in "the fiction that the law now announced has always been the law." *Chevron Oil Co. v. Huson,* 404 U.S. 97, 107 (1971).

Recognition of error in the reason for a rule is recognition of error in the rule.

If state action changing the law of contract or property on the faith of which contracts were earlier made denies due process under the Fourteenth Amendment, it makes no difference to the Constitution or the victim of the change, whether the change is made by the state legislature or the state court.

This petition should be granted to permit this Court to consider these realities and conform its jurisdiction to them.

Assuming, then, that state court action is subject to the same Constitutional limitation applicable to state legislative action, we proceed.

Enforcement of new law to invalidate contracts made on the faith of old law under which the contracts were valid impairs the obligation of contracts as a matter of fact. The courts have recognized that this is so.

> "Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid. *Contributors to Pennsylvania Hospital v. Philadelphia,* 245 U.S. 20 (1917); see *El Paso v. Simmons,* 379 U.S. 497, 533-534 (1965) (Black, J., dissenting)." *United States Trust Company v. New Jersey,* 431 U.S. 1, 19 n. 16 (1976).

In *Ohio Life Insurance and Trust Co. v. Debolt,* 57 U.S. (16 How.) 415 (1853) this Court said:

> "Indeed, the duty imposed upon this court to enforce contracts honestly and legally made, would be vain and nugatory, if we were bound to follow *those changes in judicial decisions which the lapse of time, and the change in judicial officers, will often produce* . . . . And the sound and true rule is, that if the contract when made was valid by the laws of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the State, or decision of its courts, altering the contruction of the law." 57 U.S. at 432 (emphasis added).

Where a clause imposing a continuing duty, formerly found valid, is later found invalid, the clause is treated as valid up to the time when the law with respect to its validity was changed. *Bendix Corporation v. Balax, Inc.*, 471 F.2d 149, 158 (1973).

Courts therefore apply to contracts the law as it existed when the contracts were made. *Gelpcke v. Dubuque,* 1 Wall. 175 (1863), *Green County v. Conness,* 109 U.S. 104 (1883); *Linkletter v. Walker,* 381 U.S. 618, 624, 625 (1965); *Chevron Oil Co. v. Huson, supra,* 106, 107 (1971); *Alan v. County of Wayne,* 200 N.W.2d 628, 678 (Mich. 1972). These cases involve enforceability of notes or bonds, as does this case, in which the right to accelerate the note upon sale is expressed in the note itself and constitutes an integral part of the promise to pay.[2]

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2. In *Wellenkamp* the note included a due-on-sale clause. The California Supreme Court said in footnote 12:

> "Defendant argues that even if the due-on clause contained in the deed of trust were held not to be automatically enforceable because it constitutes an unreasonable restraint on alienation, inclusion of the due-on clause in the promissory note, as required by Civil Code section 2924.5 for property containing four or fewer residential units, would make that clause part of the debt itself and therefore automatically enforceable on that basis. It is clear

It was therefore improper under the Fourteenth Amendment of the United States Constitution for the California Court of Appeal to apply to this case the decision of the California Supreme Court in *Wellenkamp,* and thereby invalidate a contract which was lawful when it was made.

The impropriety of the decision becomes magnified considering that in 1976, the California legislature enacted the provisions of Civil Code Section 2924.6.[3] The legislature thereby considered the subject of due-on-sale clauses and decided to what extent their use should be curtailed.[4] The legislature recognized its obligation under Amendments 10 and 14 to the United States Constitution to refrain from making changes in the law regarding due-on-sale clauses applicable to old contracts.

The California Court decision of which we seek review applied to an old contract a Court decision which changed the law of contracts and exercised no such restraint.

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that the purpose of Civil Code section 2924.5 is to provide notice to the borrower; it cannot be reasonably interpreted in the manner that defendant suggests."

Civil Code Section 2924.5 was enacted in 1971. It was not in effect in 1967 when the note in this case was signed.

3. These provisions are set out in Appendix D.

4. Concerning the thought that in so doing the Legislature had "occupied the field", the California Supreme Court, in *Wellenkamp, supra,* said in footnote 13:

> "We reject defendant's contention that Civil Code section 2924.6, which prohibits acceleration after the events listed therein, sanctions acceleration in other situations not specifically mentioned in that legislation. The Legislature, in enacting section 2924.6, expressly disclaimed any such intent: 'This act is not intended to affect the application of any other provision or principle of law to any type of acceleration provision *other than those specifically described in this act.*" (Stats. 1975, ch. 850, § 2.) (Emphasis added.)"

The legislative disclaimer concerns types of acceleration provisions "other than those described in this act". The acceleration clause in Petitioner's Note *is* of the type described in Civil Code Section 2924.6, but was signed in 1967, eight years before Civil Code Section 2924.6 was enacted.

The United States Constitution guarantees to United States citizens only that state government be Republican, no more, Article IV, Section 4. It may not guarantee separation of powers, so that states may make changes in the law of contract as freely by their courts as by their legislatures. All the more should United States citizens receive under the Fourteenth Amendment the protection from court-made changes in the law to which they are entitled from legislature-made changes in the law.

CONCLUSION

It is now timely for this Court to review the extent to which the State Courts themselves are subject to United States Constitutional restraint.

We submit that this Petition presents an ideal vehicle for such a review.

Dated: July 27, 1979

Respectfully submitted,
DAVID W. LENNIHAN

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Appendix A

FILED

Mar—5 1979

Court of Appeal—First App. Dist.
CLIFFORD C. PORTER, Clerk

By.....
Deputy

In the Court of Appeal of the State of California
First Appellate District, Division Three

1 Civil 45643
(Sup. Ct. No. 143399)

SUSAN GARFINKLE and GARY GARFINKLE,
Petitioners,

vs.

SUPERIOR COURT, CONTRA COSTA COUNTY,
Respondent,

WELLS FARGO BANK, et al.,
Real Parties in Interest.

The issue raised by this petition is whether the filing of the decision in *Wellenkamp v. Bank of America* (1978) 21 Cal.3d 943 on August 25, 1978 justified a subsequent trial court decision permitting Wells Fargo Bank to enforce the due-on-sale clause in its deed of trust with petitioners' predecessor in interest.

Prior to the filing of the *Wellenkamp* decision, the trial court had taken the position that a cause of action had been stated by petitioners' allegation of wrongful exercise of the due-on-sale clause of the deed of trust. The *Wellenkamp* decision affirmed petitioners' and the trial court's view of the due-on-sale clause. But it also stated a rule of retrospectivity which formed the basis for the trial court's further actions.

In the words of the court:

"It is urged that our decision should be given a purely prospective effect, given the reliance on existing laws by lenders when they entered into long-term real estate loan contracts. 'It is the general rule that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation . . . .' [citation] We see no reason to depart from this rule in this case merely because of the lenders' expectations that they would derive economic benefits from enforcement of the due-on clause. [citation] However, given the importance of the stability of real estate titles and the interest in preserving completed real estate financing arrangements, we hold that this decision shall not apply when the lender, prior to the date that this decision becomes final, has either enforced the due-on clause, resulting in sale of the subject property by foreclosure or in discharge of the accelerated debt, or when the lender has waived enforcement of the due-on clause in return for an agreement with the new buyer modifying the existing financing." (*Wellenkamp v. Bank of America* (1978) 21 Cal.3d 943, 953, 954.)

After the *Wellenkamp* decision was announced, but before it became final, Wells Fargo noticed a trustee's sale to be conducted on September 22, 1978 and moved for summary judgment on petitioners' complaint, asserting that the foreclosure would prevent application of *Wellenkamp's* ruling on the merits. Petitioners sought a preliminary injunction against the sale. They obtained a restraining order, but only on the condition that if the injunction were ultimately denied the date of sale would be deemed to be September 22, 1978. The court ultimately granted summary judgment for Wells Fargo and issued an order having the effect of denying petitioners' request for an injunction.

It is clear from the sequence of events that the trial court's rulings were based upon the *Wellenkamp* court's announcement about retrospectivity. However, in light of the results reached by the trial court, it is also clear that the court did not follow *Wellenkamp's* ruling on the merits. The effect of the court's action was to apply different rules of finality to the substantive and retrospectivity rulings of the *Wellenkamp* court. In the trial court's view the ruling on the merits became effective only on the date the decision became final, but its ruling on retrospectivity deserved respect even though not final.

A trial court may not pick and choose between parts of a non-final decision to apply. The injustice of allowing such a procedure is dramatically illustrated by this case. Petitioners (unlike Cynthia Wellenkamp) had convinced the trial court that they could state a cause of action for improper use of a due-on-sale clause. There was no impending threat that the due-on-sale clause would be exercised.[1] The *Wellenkamp* decision should have solidified petitioners' position. Instead, it was used to defeat them.

The *Wellenkamp* court picked the date of its decision's finality rather than the date of its filing as the cut-off date for exercise of due-on-sale clauses for the obvious reason that foreclosures in progress or which would have occurred before the decision became final should not be prevented by a non-final decision. It is another matter to apply the retrospectivity ruling to justify a foreclosure which would not have taken place without the *Wellenkamp* decision. In the former case the non-final decision is not allowed to intrude upon actions already in progress. This is proper since the decision may be changed or nullified by rehearing. In the latter case though, the non-final decision is read as if it were final, prematurely applying a retrospectivity rule which might itself be changed by a grant of rehearing. The non-final decision intrudes with a force it should not be permitted to wield during the rehearing time.

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1. They had Wells Fargo Bank's agreement that it would not foreclose pending litigation. And even if that agreement were narrowly interpreted to apply only to litigation of other points in the lawsuit, petitioners stood a good chance of obtaining an injunction in light of the fact that their complaint had withstood a demurrer.

We are convinced that the trial court erred in conditioning its restraining order upon deeming the sale to have taken place on September 22, 1978. Foreclosure should have been restrained without condition, and summary judgment for the bank therefore denied. We have reached this conclusion after a full briefing by the parties. An alternative writ would add nothing to the presentation already made. A peremptory writ is proper (Code Civ. Proc., § 1088; *San Diego Wholesale Credit Men's Assn. v. Superior Court* (1973) 35 Cal.App.3d 458; *Goodenough v. Superior Court* (1971) 18 Cal.App.3d 692, 697) and should issue.

Let peremptory writ of mandate issue directing the Contra Costa County Superior Court to set aside its order granting summary judgment for real parties and to set aside those portions of its restraining order of September 14, 1978, amended October 13, 1978 and preliminary injunction of November 7, 1978 which condition issuance upon deeming the date of sale to be September 22, 1978.

.....

White, P.J.

WE CONCUR:

.....

Scott, J.

.....

Feinberg, J.

Appendix B

CLERK'S OFFICE, SUPREME COURT
4250 State Building
SAN FRANCISCO, CALIFORNIA 94102

MAY 3 1979

I have this day filed Order

HEARING DENIED

In re: 1 Civ *No.* 45643

Garfinkle

vs.

Sup. Ct. Contra Costa
Wells Fargo et al)

Respectfully,

G. E. BISHEL
Clerk

Appendix C

SEE DISSENTING OPINION

SUPREME COURT
FILED
AUG 25 1978
G. E. BISHEL, Clerk
Deputy

COPY

In the Supreme Court of the State of California

L. A. 30776

Super. Ct. No. 15974

CYNTHIA J. WELLENKAMP,
Plaintiff and Appellant,

v.

BANK OF AMERICA et al.,
Defendants and Respondents.

We address today the question whether enforcement of a due-on clause,[1] contained in a deed of trust securing real property, upon an outright sale of that property, constitutes an unreasonable restraint on alienation in violation of California law.

In July 1973, Birdie, Fred and Dorothy Mans (Mans) purchased a parcel of real property in Riverside County which they financed by a loan from defendant Bank of America in the amount of $19,100 (at 8 percent interest per annum) giving the

1. A due-on clause is a device commonly used in real property security transactions to provide, at the option of the lender, for acceleration of the maturity of the loan upon the sale, alienation or further encumbering of the real property security.

bank their promissory note secured by a deed of trust. The deed of trust contained the standard due-on clause which provided that if the trustor (the Mans) "sells, conveys, alienates . . . said property or any part thereof, or any interest therein . . . or becomes divested of [his] title or any interest therein . . . in any manner or way, whether voluntarily or involuntarily, . . . Beneficiary shall have the right at its option, to declare said note . . . secured hereby . . . immediately due and payable without notice. . . ." The Mans' deed of trust named defendant Continental Auxiliary Company as trustee.

In July 1975, plaintiff Cynthia Wellenkamp purchased the property from the Mans. She paid the Mans the amount of their equity in the property, that is, the difference between the total selling price to plaintiff and the balance outstanding on the Mans' loan, and agreed with the Mans to assume the balance of their loan from defendant. A grant deed, transferring title to plaintiff was recorded on July 10, 1975. Defendant bank (hereinafter defendant) was given prompt notice of the transfer of title to plaintiff as well as her check for the July payment on the Mans' loan. Defendant thereupon returned this check to plaintiff with a letter notifying her of its right to accelerate upon transfer of the property by the Mans. The letter offered to waive defendant's right to accelerate in return for plaintiff's agreement to assume the Mans' loan at an increased rate of interest (from the original 8 percent to 9¼ percent per annum). A printed assumption agreement was enclosed with defendant's letter for plaintiff's signature.

Upon plaintiff's failure to accede to defendant's demand that the interest on the loan be raised to the then current rate, defendant filed a notice of default and election to sell under the deed of trust.

Plaintiff then filed the present action in which she sought an injunction against enforcement of the due-on clause, and a dec-

laration that exercise of such a clause, without any showing that defendant's security had been impaired as a result of the sale of the property to plaintiff, constituted an unreasonable restraint on alienation in violation of California law.

After the superior court granted plaintiff's motion for a preliminary injunction restraining defendant's foreclosure sale of the property, defendant demurred to plaintiff's complaint on the ground that it failed to state facts sufficient to constitute a cause of action for declaratory relief because automatic enforcement of a due-on clause after transfer of the property in an outright sale is valid under California law, and therefore, plaintiff could not prevail on the merits. After a hearing the superior court sustained the general demurrer, without leave to amend, and entered a judgment dismissing plaintiff's complaint.[2] This appeal followed.

A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the parties under a written instrument or with respect to property and requests that the rights and duties of the parties be adjudged by the court. (Code Civ. Proc., § 1060; Maguire v. Hibernia Sav. and Loan Soc. (1944) 23 Cal.2d 719.) If these requirements are met and no basis for declining declaratory relief appears, the court should declare the rights of the parties whether or not the facts alleged establish that the plaintiff is entitled to favorable declaration. (Bennett v. Hibernia Bank (1956) 47 Cal.2d 540, 550; Columbia Pictures v. DeToth (1945) 26 Cal.2d 753.)

The complaint herein alleges a controversy over the legal rights and duties of plaintiff and defendant under the deed of

2. In April 1976 the parties filed a stipulation for deferring foreclosure, whereby defendant agreed to refrain from taking further action to foreclose the deed of trust during the pendency of this appeal and plaintiff agreed to pay defendant the amount of the monthly payments on the Mans' loan.

trust containing a due-on clause. Plaintiff contends that this clause is unenforceable absent a showing by the lender of impairment to its security; whereas defendant contends that it can automatically enforce the clause without any further showing. It is clear that the complaint shows the existence of an actual controversy sufficient to state a cause of action for declaratory relief. Therefore, the trial court committed error when it tested the sufficiency of the complaint by a determination of the merits and sustained the demurrer on the ground that no cause of action for declaratory relief had been stated. Defendant urges that, notwithstanding this procedural error by the trial court, judgment of dismissal should nonetheless be affirmed on appeal because plaintiff would not be entitled to a favorable declaration on remand. Defendant bases this proposal on its contention that automatic enforcement of the due-on clause after transfer of the subject real property in an outright sale does not constitute an unreasonable restraint on alienation. We do not agree.

We begin our discussion with a summary of the California law on restraints on alienation. Civil Code section 711 sets forth the basic law on the subject and states simply that "conditions restraining alienation, when repugnant to the interest created, are void." Our decision in Coast Bank v. Minderhout (1964) 61 Cal.2d 311, recognized that this rule was not absolute in its application, but forbade only *unreasonable* restraints against alienation. In determining whether a due-on clause was unreasonable in *Coast Bank* we looked at whether the restraint was necessary to prevent impairment to the lender's security. We conclude that the restraint was reasonable in that case.

We next had occasion to determine whether a given restraint was unreasonable within the meaning of *Coast Bank* in La Sala v. American Sav. and Loan Assn. (1971) 5 Cal.3d 864. The restraint involved in *La Sala* was a due-on clause which provided

for acceleration of the maturity of the loan upon encumbrance of the subject property. In determining whether enforcement of this clause constituted an unreasonable restraint on alienation, we considered not only whether the restraint was necessary to prevent impairment to the lender's security, but also the effect that enforcement of the restraint would have on alienation. We concluded that enforcement of a due-on clause upon encumbrance of the subject property involved a significant restraint on alienation such as to preclude enforcement of the clause unless the lender could show that enforcement was reasonably necessary to protect its security.

Three years later, in Tucker v. Lassen Sav. & Loan Assn. (1974) 12 Cal.3d 629, we confronted the question whether automatic enforcement of a due-on clause upon the sale of the subject property by installment contract constituted an unreasonable restraint against alienation. Examining the principles developed in *La Sala* we recognized that a direct relationship exists between the *justification* for enforcement of a particular restraint on the one hand, and the *quantum of restraint*, the actual practical effect upon alienation which would result from enforcement, on the other. Thus, the greater the quantum of restraint that results from enforcement of a given clause, the greater must be the justification for that enforcement. Applying this test in Tucker v. Lassen Sav. & Loan Assn., *supra*, 12 Cal.3d 629, we concluded that enforcement of a due-on clause upon sale of the property by installment contract involved a high quantum of restraint requiring a significant showing that enforcement was necessary to protect the lender's security.

We now proceed to apply the principles set forth in *La Sala* and *Tucker* to the case at bench which presents the issue, stated at the outset of this opinion, whether a due-on clause contained

in a promissory note or deed of trust may be automatically enforced upon an outright sale of the property securing the loan.[3]

We first discuss the *quantum of restraint* imposed by enforcement of the due-on clause after transfer of the property by outright sale, for if, as defendant contends, automatic exercise of the clause in these circumstances results in little, if any, restraint on alienation, we need not reach the question whether there exists justification sufficient to warrant enforcement.

Although we suggested in *dicta* in both *Tucker* and *La Sala* that the restraint on alienation resulting from acceleration after an outright sale appeared to be de minimis, we indicated in those decisions that by the term "outright" sale, we were referring to transactions wherein the seller/trustor received full payment from the buyer, usually through new financing of the purchase (an "all cash to seller" sale). We reasoned that the restraint on alienation was slight in such cases because the seller received payment sufficient to discharge the balance of the loan secured by the deed of trust,[4] whereas in cases involving junior encumbrances or installment land contracts, the seller normally received only a fraction of the balance outstanding on the loan.

We do not here so restrict the meaning of the term "outright sale," but instead, and in accordance with actual real estate parlance, we refer by that term to any sale by the trustor of property wherein legal title (and usually possession) is transferred.

Outright sales of real property commonly involve different types of financing arrangements depending upon the circum-

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3. We note that there are a number of decisions in other jurisdictions which reach differing results on the question whether a due-on clause can be automatically enforced upon the occurrence of an outright sale of the subject property. A lengthy discussion of these decisions is unnecessary, however, as we feel that our own decisions in *Tucker* and *La Sala* provide both an adequate and appropriate basis for determining what the law is in California on this question.

4. Indeed, in substantially all cases herein new financing is obtained the escrow instructions will contemplate direct payment of the existing loan balance to the lender.

stances existing at the time of sale. Thus, when new financing is available and economically feasible, a buyer will be able to arrange to pay the seller the purchase price in full, in an "all cash to seller" arrangement. When, however, new financing is unavailable or is economically unfeasible, the buyer may arrange, as did plaintiff herein, to pay the seller only the amount of the seller's equity in the property, agreeing to assume or take "subject to" the existing deed of trust, in a "cash to loan" arrangement.[5]

The availability of new financing often depends upon general economic conditions. In times of inflation, when money is "tight" and funds available for real estate loans are in short supply, new financing may be difficult, if not impossible to obtain. The same result may occur when interest rates and the transactional costs of obtaining new financing are high, making it economically unfeasible for the buyer to acquire a new loan. When economic conditions are such that new financing is either unavailable or economically unfeasible, the seller and buyer will normally agree to a form of financing arrangement wherein the buyer will assume the seller's loan. In such circumstances, if the lender is unwilling to permit assumption of the existing loan, and instead elects to enforce the due-on clause, transfer of the property may be prohibited entirely, because the buyer will be unable to substitute a new loan for the loan being called due, and the seller will not receive an amount from the buyer sufficient to discharge that loan, particularly when the balance due is substantial. (See 1 Miller & Starr, Current Law of Cal. Real Estate, pt. 1 (1975 ed.) § 3:65, pp. 435-436.) Even when the lender is willing to waive its option to accelerate in return for the assumption of the existing loan at an increased interest rate, an inhibitory effect

5. Other financing arrangements that may be utilized in these circumstances include transactions wherein the seller takes back a second deed of trust or an "all-inclusive" deed of trust.

on transfer may still result. The buyer, faced with the lender's demand for increased interest, may insist that the seller lower the purchase price. The seller would then be forced to choose between lowering the purchase price and absorbing the loss with the resulting reduction in his equity interest,[6] or refusing to go through with the sale at all. In either event, the result in terms of a restraint on alienation is clear.[7] (See Note, *Judicial Treatment of the Due-On-Sale Clause: The Case for Adopting Standards of Reasonableness and Unconscionability* (1975) 27 Stan. L.Rev. 1109, 1113.)

It is against this effect on alienation that we must measure the factors advanced in justification. In *Tucker* we held that a restraint on alienation could be justified only when a legitimate interest of the lender was threatened. We indicated that such interests, which pertain to protection against impairment to the lender's security, included preservation of the security from waste or depreciation and protection against the "moral risks" of having to resort to the security upon default by an uncreditworthy buyer. (See Hetland, *Real Property and Real Property Security: The*

6. A state policy that home equities are to be protected and conserved is set forth in Health and Safety Code section 50007 (formerly § 41007).

7. The argument of the dissent—that our holding places the seller of encumbered real property at a "competitive advantage" over the seller of unencumbered real property in periods of rising interest and tight money—simply misses the point. The fact that market conditions may operate to hamper the sale of some real property during such periods certainly cannot be held to justify the hampering of all such sales regardless of whatever financing arrangements may be outstanding against such property. Sellers of unencumbered real property have presumably benefited from lower interest rates in achieving their position. To require sellers of encumbered real property, who have not enjoyed this benefit, to suffer from market contingencies along with those who have, is to take a very narrow view of "competitive advantage." In any event we here concern ourselves with the effect of due-on provisions in the sale of properties subject to existing financing—not with the effect of market conditions upon properties not subject to existing financing. To the extent that such clauses hamper alienation of properties in the former category, a restraint upon alienation occurs.

Well Being of the Law (1965) 53 Cal.L.Rev. 151, 170; see also Cal. Real Estate Secured Transactions (Cont.Ed.Bar 1970) § 4.56, p. 184.)

Defendant contends that the risk of waste and default is significant in an outright sale because both possession and legal title to the property are transferred, thereby eliminating any incentive or ability that the seller/trustor would have to avoid realization of these risks by action of the buyer. Although we have previously distinguished on this basis both the junior encumbrance, where neither possession nor legal title was transferred (*La Sala*) and the installment land contract, where possession but not legal title was transferred (*Tucker*), we are now convinced that, although the original borrower/seller no longer retains an interest in the property after transfer of legal title in an outright sale involving no secondary financing by the seller (see fn. 5, *ante*)[8] this fact does not necessarily increase the risk to the lender that waste or default will occur. Thus the buyer in an outright sale, in order to pay off the seller's equity, may make a large down payment on the property, thereby creating an equity interest in the property *in him* which is sufficient to provide an adequate incentive not to commit waste or permit the property to depreciate. Moreover, the buyer in such an outright sale may be at least as good, if not a better credit risk than the original borrower/seller. We therefore conclude that although circumstances may arise in which the interests of the lender may justify the enforcement of a due-on clause in the event of an

8. When the seller does not receive the value of his equity in cash but takes back a second or "all-inclusive" deed of trust for a portion thereof, he of course retains an equity interest in the property which provides him with an incentive to prevent waste or default. In this case, then, both the buyer and the seller have an interest in preserving the security. The lender's position thus resembles that occupied by it in the context of an installment land sale contract. (See 1 Miller & Starr, Current Law of California Real Estate, pt. 1, *supra*, § 3:65, pp. 439-440, fns. 15 and 16 and accompanying text.)

outright sale, the mere fact of sale is not in itself sufficient to warrant enforcement of the clause, and the restraint on alienation resulting therefrom, in the absence of a showing by the lender that such circumstances exist.[9]

We furthermore reject defendant's contention that the lender's interest in maintaining its loan portfolio at current interest rates justifies the restraint imposed by exercise of a due-on clause upon transfer of title in an outright sale. Although we recognize that lenders face increasing costs of doing business and must pay increasing amounts to depositors for the use of their funds in making long-term real estate loans as a result of inflation and a competitive money market, we believe that exercise of the due-on clause to protect against this kind of business risk would not further the purpose for which the due-on clause was legitimately designed, namely to protect against impairment to the lender's security that is shown to result from a transfer of title.[10] Economic risks such as those caused by an inflationary economy are among the general risks inherent in every lending transaction. They are neither unforeseeable nor unforeseen. Lenders who provide funds for long-term real estate loans should and do, as a matter of business necessity, take into account their projections of future economic conditions when they initially determine the rate of payment and the interest on these long-term loans. (See Note, *Judicial Treatment of the Due-On Sale Clause: The Case for Adopting Standards of Reasonableness and Unconscionability*,

9. In the instant case the party seeking enforcement of the due-on clause is an institutional lender. We limit our holding accordingly. We express no present opinion on the question whether a private lender, including the vendor who takes back secondary financing, has interests which might inherently justify automatic enforcement of a due-on clause in his favor upon resale.

10. Automatic enforcement of the due-on clause is not the only method by which lenders can adjust the yield from their loan portfolios to meet increases in the cost of funds for these loans. With the enactment of Civil Code section 1916.5, the variable interest rate mortgage has become an attractive and viable alternative.

supra, 27 Stan. L.Rev. at p. 1117.) Unfortunately, these projections occasionally prove to be inaccurate. We believe, however, that it would be unjust to place the burden of the lender's mistaken economic projections on property owners exercising their right to freely alienate their property through the automatic enforcement of a due-on clause by the lender.[11] As we stated in *La Sala,* ". . . a restraint on alienation cannot be found reasonable merely because it is commercially beneficial to the restrainor. Otherwise one could justify any restraint on alienation upon the ground that the lender could exact a valuable consideration in return for its waiver, and that sensible lenders find such devices profitable." (5 Cal.3d at pp. 880-881, fn. 17.)

For the foregoing reasons, we hold that a due-on clause contained in a promissory note or deed of trust[12] cannot be enforced upon the occurrence of an outright sale unless the lender can demonstrate that enforcement is reasonably necessary to protect against impairment to its security or the risk of default.[13] We

11. We note that lenders have utilized the exercise of a due-on clause for other purposes in addition to maintaining their loan portfolios at current rates of interest. The clause has also been used as a lever to exact substantial consideration from the buyer in the form of assumption and waiver fees. (See Cherry v. Home Sav. & Loan Assn. (1969) 276 Cal.App.2d 574; Hellbaum v. Lytton Sav. & Loan Assn. (1969) 274 Cal.App.2d 456.)

12. Defendant argues that even if the due-on clause contained in the deed of trust were held not to be automatically enforceable because it constitutes an unreasonable restraint on alienation, inclusion of the due-on clause in the promissory note, as required by Civil Code section 2924.5 for property containing four or fewer residential units, would make that clause part of the debt itself and therefore automatically enforceable on that basis. It is clear that the purpose of Civil Code section 2924.5 is to provide notice to the borrower; it cannot be reasonably interpreted in the manner that defendant suggests.

13. We reject defendant's contention that Civil Code section 2924.6, which prohibits acceleration after the events listed therein, sanctions acceleration in other situations not specifically mentioned in that legislation. The Legislature, in enacting section 2924.6, expressly disclaimed any such intent: "This act is not intended to affect the application of any other provision or principle of law to any type of acceleration provisions other than those specifically described in this act." (Stats. 1975, ch. 850, § 2.)

therefore disapprove Hellbaum v. Lytton Sav. & Loan Assn., *supra,* 274 Cal.App.2d 456 and Cherry v. Home Sav. & Loan Assn., *supra,* 276 Cal.App.2d 574, and overrule to the extent inconsistent with this opinion the case of Coast Bank v. Minderhout, *supra,* 61 Cal. 2d 311.

It is urged that our decision should be given a purely prospective effect, given the reliance on existing laws by lenders when they entered into long-term real estate loan contracts. "It is the general rule that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation . . . ." (County of Los Angeles v. Faus (1957) 48 Cal.2d 672, 680-681.) We see no reason to depart from this rule in this case merely because of the lenders' expectations that they would derive economic benefits from enforcement of the due-on clause. (See Texas Co. v. County of Los Angeles (1959) 52 Cal.2d 55.) However, given the importance of the stability of real estate titles and the interest in preserving completed real estate financing arrangements, we hold that this decision shall not apply when the lender, prior to the date that this decision becomes final, has either enforced the due-on clause, resulting in sale of the subject property by foreclosure or in discharge of the accelerated debt, or when the lender has waived enforcement of the due-on clause in return for an agreement with the new buyer modifying the existing financing.

The judgment is reversed.

MANUEL, J.

WE CONCUR:

BIRD, C. J.
TOBRINER, J.
MOSK, J.
RICHARDSON, J.
NEWMAN, J.

COPY

Wellenkamp v. Bank of America
L.A. 30776

DISSENTING OPINION BY CLARK, J.

Holding that exercise of a "due-on clause" upon outright sale of real property unreasonably restrains that sale, the majority opinion either misreads or rejects the very decisions on which it relies, particularly Tucker v. Lassen Sav. & Loan Assn. (1974) 12 Cal.3d 629. Additionally, the majority opinion awards the owner of encumbered real property a bonus in that he can now sell his property for something in excess of what he could sell it for if unencumbered.

We have thus come full circle. In attempting to take away contractual rights of lenders in order to assist borrowers in selling encumbered properties, the majority opinion has devised a scheme which affords yesterday's borrower a clear advantage over today's seller who comes to the marketplace with his property free from encumbrance. But our beneficence may be shortsighted. For in attempting to assist the Wellenkamps, the majority opinion must necessarily restrict if not dry up mortgage funds otherwise available to the next generation of borrowers.

I briefly review the route by which we arrive at the threshold of today's decision. In Coast Bank v. Minderhout (1964) 61 Cal.2d 311, our unanimous court agreed that reasonable restraints on alienation of real property were lawful, and held that it was reasonable for a lender to condition its continued extension of credit to borrowers "on their retaining their interest in the property that stood as security for the debt." (*Id.*, at p. 317.)

In La Sala v. American Sav. & Loan Assn. (1971) 5 Cal.3d 864, we dealt with a due-on-encumbrance clause and distinguished *Coast Bank*. We first noted that enforcement of a due-on-sale clause as in *Coast Bank* was justified because of lender concern for a borrower's continued interest in maintaining the property, but concluded that because the creation of a junior encumbrance in the property did not terminate the borrower's continuing interest, enforcement of the due-on clause was not necessary to protect the lender. We held that enforcement of a due-on-encumbrance clause could thus be an unreasonable restraint on alienation. (*Id.*, at p. 880.) However, a near unanimous court noted that if particular circumstances indicated the lender's security was endangered "the enforcement of the due-on-encumbrance clause may be reasonably necessary . . ." (*id.*, at p. 881), relying on *Coast Bank* (*id.*, at p. 882).

Finally, in Tucker v. Lassen Sav. & Loan Assn., *supra*, 12 Cal.3d 629, we dealt with a due-on clause in the context of a proposed installment sale contract. We reviewed the existing law, refined the rules announced in *Coast Bank* and *La Sala* and proclaimed that the reasonableness of a restraint on alienation is to be measured by balancing the quantum of resulting restraint when a borrower is forced to comply with a due-on clause, against the justification for the restraint, that is, the measure of the hazard to the lender's security should the property be alienated as proposed. We unanimously concluded that the restraint was not reasonably justified when weighed against the quantum of restraint imposed on the borrower in an installment sale context. But as in *La Sala* we reaffirmed *Coast Bank* by demonstrating decreased justification for—and increased quantum of restraint in—an installment sale when compared with an outright sale. (*Id.*, at p. 638.)

The majority opinion now proposes to abandon what *Coast Bank*, *La Sala* and *Tucker* have taught us. Having recognized the due-on clause in junior encumbrances and installment sales to constitute unreasonable restraints *only* because they were deemed to require striking a *different* balance from that in an outright sale, the majority opinion leaps to the conclusion that a due-on

clause in an outright sale is unenforceable, thus obliterating our prior distinction.

While the majority opinion purports to weigh justification for restraint against quantum, it errs by failing to accurately weigh relevant factors. It first recognizes that if "automatic exercise of the clause in these circumstances results in litle, if any, restraints on alienation, we need not reach the question whether there exists justification sufficient to warrant enforcement." (*Ante,* p. 949.) It then purports to weigh the restraint which may result to the seller. In doing so, it must guess the marketplace. It imagines a market condition whereby money is "tight" or unavailable, and lenders are reluctant to loan except at interest rates higher than that at which the seller is obligated on an older existing loan. Exercise of a due-on clause in such circumstances, the opinion argues, restrains the seller because he cannot sell except by taking cash or a note for his "equity." If the lender is unwilling to permit assumption of its loan at the original interest rate, the seller is unreasonably restrained from selling his house. So it is argued.

What the majority opinion fails to recognize is that the "restraint" in its hypothetical case results not from exercise of the contractual clause but rather from the bleak and unpredictable economic conditions it paints. Of course, whenever money is tight and interest rates are high, a brake on those sales requiring financing naturally results.[1] A seller possessing property and a buyer lacking sufficient funds can seldom do business if financing is unavailable. It may be they cannot do business at all because

1. If the sale does not require outside financing, there is no problem as there is money available to retire the outstanding loan. The majority opinion also recognizes there is no problem when a tight money market does not exist: "Thus, when new financing is available and economically feasible, a buyer will be able to arrange to pay the seller the purchase price in full, . . ." (*Ante*, p. 950.)

of the seasonal unavailability of funds to the prospective buyer.[2] If they can do business other than by a contract of sale it follows that the buyer must pay the going interest rate and the seller, as an incentive to the buyer, may be required to reduce the selling price. If a loan exists on the property with a due-on clause, no *increased* restraint on selling results if the lender cannot accept the proposed buyer, the situation then being the same as in the case of the unavailability of funds to the proposed buyer. If the lender will permit assumption but only at an increased interest rate, again no *increased* restraint results because without the existing loan the buyer would be required to pay the higher interest rate and the seller may be required to compromise his selling price. There is thus no increased restraint on alienation beyond that inherent in the economic conditions postulated by the majority. But is it the province of this court to predict the unpredictable?

The net result of the majority opinion is best illustrated by analyzing the real effect on all parties upon denying the lender its contractual right to exercise a due-on clause. As we have noted, in a tight money market, the seller of unencumbered real property is already seriously handicapped. However, if his neighbor's home possesses an existing loan with a now unenforceable due-on clause, that seller is granted an immediate competitive advantage. In spite of his original agreement, he can now "sell" the loan without regard to the lender's wishes. His buyer has automatic financing where none is otherwise available. The interest he will be required to pay is less than market. Because that seller has a marketable, sought-after asset in the form of a low-interest transferable loan—something he never bargained for—he can ask for and expect to get additional considerations from his buyer. And the buyer may also look forward to the same

2. They could, of course, do business by a contract of sale. (Tucker v. Lassen Sav. & Loan Assn. (1974) 12 Cal. 3d 629.)

advantage on resale. The loan has thus become not a restraint on alienation but a factor making salable what before could not be sold.[3]

The majority opinion, after declaring the due-on clause imposes a serious restraint in the circumstances it postulates, proceeds to negate justification. It declares that factors this court has unanimously deemed to justify exercise of the clause in the past are of little consequence now. It acknowledges that we have—up to now—held that a lender could exercise a due-on clause on an outright sale to protect interests "which pertain to protection against impairment to the lender's security, included preservation of the security from waste or depreciation and protection against the 'moral risk' of having to resort to the security upon default by an uncreditworthy buyer. (See Hetland, *Real Property and Real Property Security: The Well Being of the Law* (1965) 53 Cal.L.Rev. 151, 170; see also Cal. Real Estate Secured Transactions (Cont.Ed Bar (1970) § 4.56, p. 184)" (*Ante*, p. 951.) However, the opinion dismisses such recognized usage with the gratuitous comment that "we are now convinced that, although the original borrower/seller no longer retains an interest in the property after transfer of legal title in an outright sale . . . this

3. The majority cling to the thesis that its decision today serves to eliminates restraints on alienation. However, in footnote 7 (*ante*, p. 951.) it concedes its concern *only* for properties with existing financing to the disadvantage of unencumbered properties, when such properties are competing on the same market. In an attempt to justify its lack of equal concerns, it argues that sellers of unencumbered real property "have presumably benefitted from lower interest rates in achieving their position," and now such advantage should be balanced in favor of those who have not benefited, they being the sellers of encumbered real property. The presumption by the majority is completely gratuitous—nothing in the record nor in sound reason supports it. The declared policy is manifestly one which would be better left to our Legislature.

fact does not necessarily increase the risk to lender that waste or default will occur." (*Ante*, pp. 951-952.) The majority refers to no authority in support of its conclusion that the mere fact of an outright sale "is not in itself sufficient to warrant enforcement" of a due-on clause "in the absence of a showing by the lender that such circumstances exist." (*Ante*, p. 952.)

The lack of citation to authority in support of the majority's conclusion is understandable in view of its purported but inaccurate application of principles enunciated in Tucker v. Lassen Sav. & Loan Assn., *supra*, 12 Cal.3d 629. In justification for holding a due-on clause unenforceable on sale of property by installment contract, the unanimous *Tucker* court stated: "Thus in the normal case the vendor, having received a small down payment and restraining legal title, has a considerable interest in maintaining the property until the total proceeds under the contracts are received; *in this he differs markedly from the vendor of property where there has been an outright sale.*" (Tucker v. Lassen Sav. & Loan Assn., *supra*, 12 Cal.3d 629, 638; italics added.)

The majority opinion errs first in concluding that a due-on clause unreasonably restricts outright sale of property; errs again in concluding there is little or no justification for the clause, contrary to our earlier holdings. We err again in failing to recognize that lenders and borrowers, owners and prospective owners, should be allowed to run their own affairs with minimal governmental intrusion—particularly from this branch.

CLARK, J.

Appendix D

§ 2924.6. [Acceleration: Prohibitions Applicable to loans executed after January 1, 1976]

(a) An obligee may not accelerate the maturity date of the principal and accrued interest on any loan secured by a mortgage or deed of trust on residential real property solely by reason of any one or more of the following transfers in the title to the real property:

(1) A transfer resulting from the death of an obligor where the transfer is to the spouse who is also an obligor.

(2) A transfer by an obligor where the spouse becomes a coowner of the property.

(3) A transfer resulting from a decree of dissolution of the marriage or legal separation or from a property settlement agreement incidental to such a decree which requires the obligor to continue to make the loan payments by which a spouse who is an obligor becomes the sole owner of the property.

(4) A transfer by an obligor or obligors into an inter vivos trust in which the obligor or obligors are beneficiaries.

(5) Such real property or any portion thereof is made subject to a junior encumbrance or lien.

(b) Any waiver of the provisions of this section by an obligor is void and unenforceable and is contrary to public policy.

(c) For the purposes of this section, "residential real property" means any real property which contains at least one but not more than four housing units.

(d) This act applies only to loans executed or refinanced on or after January 1, 1976.

Added Stats 1975 ch 850 § 1.

Note—Stats 1975 ch 850 also provides: § 2. This act is not intended to affect the application of any other provision or principle of law to any type of acceleration provision other than those specifically described in this act.